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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-568

LUTHER ESTEP, a Minor, by JAMES STANLEY, His Legally Appointed Guardian, *Petitioner*

v.

JANLER PLASTIC MOLD CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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v.

JANLER PLASTIC MOLD CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Luther Estep, a minor, by James Stanley, his legally appointed guardian, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled case on May 29, 1974 (*infra,* pp 1a, 4a).

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 57 Ill. 2d 395, 312 N.E. 2d 618 (*infra,* pp. 2a-

4a). The opinion of the Appellate Court of Illinois, First District, is reported at 11 Ill. App. 3d 551, 297 N.E. 2d 341 (*infra*, pp. 4a-6a). The order of the Circuit Court of Cook County, Illinois, is unreported (*infra*, p. 7a).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 29, 1974 (*infra*, pp. 1a, 4a). A petition for rehearing was denied on June 28, 1974 (*infra*, p. 8a). On September 16, 1974, Mr. Justice William H. Rehnquist entered an order extending the time within which to file a petition for a writ of certiorari to November 12, 1974. The jurisdiction of this court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The State of Illinois substitutes a system of workmen's compensation for a common law action in tort to indemnify workers for injury or death sustained in an industrial accident, but preserves the common law remedy in the case of an "illegally employed minor" if he or his representative files with the Industrial Commission of Illinois a rejection of workmen's compensation benefits within six months after the time of injury or death. The question presented is whether a minor is denied due process and equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution when he is barred from pursuing his common law cause of action for personal injury sustained in an industrial accident because he did not reject his workmen's compensation benefits within six months after the time of his injury where (1) no notice of the six-month rejection requirement was given him, (2) no guardian had been appointed to act

for him within the six-month period, and (3) limitations on other actions do not time-bar a minor until two years after he attains his majority.

STATUTE INVOLVED

The State of Illinois provides by statute that (Ill. Rev. Stat., ch. 48, § 138.5 (1973)):

> Any illegally employed minor or his legal representative shall, except as hereinafter provided, have the right within six months after the time of injury or death, to file with the [Industrial] Commission, a rejection of his right to the benefits under this [Workmen's Compensation] Act, in which case such illegally employed minor or his legal representatives shall have the right to pursue his or their common law or statutory remedies to recover damages for such injury or death.

STATEMENT

On March 10, 1970, petitioner Luther Estep, then a minor, by his guardian brought a common law action against his employer in the Circuit Court of Cook County, Illinois, to recover for personal injuries he sustained in an industrial accident. As amended, his complaint alleges that:

Luther Estep was employed by Janler Plastic Mold Corporation (Janler), a company engaged in interstate commerce, in the business of manufacturing and fabricating molds for use in making plastic and sundry products (R. 35-36). Janler hired Estep to work at its Chicago, Illinois, plant, to assist in maintaining and cleaning electrically driven machinery, including band saws (R. 37). On September 26, 1968, then seventeen years old (R. 38), in the course of maintaining an electrically power-driven band saw, Estep sustained

a severe injury to his left hand, causing its amputation at the wrist (R. 39).

The complaint further alleges that at the time of Estep's hire and injury, section 212(c) of the Fair Labor Standards Act of 1938 barred the employment of "any oppressive child labor" (29 U.S.C. § 212(c)), and section 203(1) of that Act defined "oppressive child labor" as a "condition of employment under which . . . any employee between the ages of 16 and 18 years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being . . ." (29 U.S.C. § 203(1)); (R. 37-38) The Secretary of Labor at all material times found as "particularly hazardous for the employment of minors between 16 and 18 years of age" (1) the "occupations of operator of or helper on the following power-driven fixed or portable machines . . .: Band saws", and (2) the "occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears" (29 CFR 570.65; R. 38). Janler therefore illegally employed Estep in a particularly hazardous occupation (R. 38-39).

The complaint additionally alleged that on September 23, 1969, James Stanley was appointed to serve as Estep's guardian (R. 39). On November 17, 1969, Stanley filed a "Rejection of Right To Benefit Under The Workmen's Compensation Act" with the Industrial Commission of Illinois, stating that Estep "was a minor boy . . . illegally employed by . . . Janler" injured in an industrial accident, and that as guardian of Estep he "does hereby reject the rights of said minor to any benefits under the provisions of the Workmen's

Compensation Act of Illinois, and does hereby elect to pursue the minor's common law and statutory remedies to recover damages for . . . injuries" (R. 14-15, 39-40). This Rejection invoked section 5(a) of the Illinois Workmen's Compensation Act authorizing an "illegally employed minor or his legal representatives" to pursue "common law or statutory remedies to recover damages for . . . injury or death" if a rejection of workmen's compensation benefits is filed with the Industrial Commission "within 6 months after the time of injury or death . . ." (R. 39, *supra*, p. 3). The Rejection, while filed more than six months subsequent to the time of injury, was filed within six months of the appointment of Stanley to serve as Estep's guardian (R. 40). The complaint concluded with a prayer for relief to compensate Estep for his injury (R. 40).

On April 5, 1970, Janler moved to dismiss the complaint on the ground that the action could not be maintained because the Rejection had not been filed within six months of the injury (R. 17). In opposing the motion, Estep argued that the six-month period "does not begin to run until the appointment of a legal guardian and that to otherwise bind the minor would be in violation of the due process clause of the United States Constitution and the Illinois Constitution . . ." (Answer to motion, p. 9). The Circuit Court nevertheless dismissed the complaint on the limitations ground (*infra*, p. 7a). On appeal, Estep reiterated that the six-month period "did not begin to run until the appointment of a legal guardian" (br. p. 21), and that any other interpretation would be constitutionally objectionable (br. pp. 2, 18-19). The Appellate Court of Illinois affirmed the order dismissing the complaint (*infra*, p. 6a). On further appeal to the Supreme Court

of Illinois, Estep again advanced the same arguments, both statutory (br. pp. 16-23) and constitutional (br. pp. 2, 16-17, 24), against dismissal of the complaint on limitations grounds, but the Supreme Court of Illinois affirmed the dismissal judgments (*infra*, pp. 2a-4a). No Illinois court during the proceedings addressed the federal constitutional claim in terms although it had been urged at every stage throughout the litigation.[1]

REASONS FOR GRANTING THE WRIT

This case intersects at three points of this Court's recent central concern. It requires consideration of another aspect of the special characteristics of the young in determining the constitutional protection available to youth.[2] It confronts the recurrent ques-

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[1] Janler had also moved to dismiss the complaint on the ground that the determination whether a minor was illegally employed is governed solely by reference to Illinois law to the exclusion of federal law, and that by Illinois law Estep was not illegally employed (R. 17). The Circuit Court ordered and the Appellate Court upheld dismissal of the complaint on this alternative ground as well as on the limitations ground (*infra*, pp. 5a, 7a). However, the Illinois Supreme Court expressly refrained from basing decision on the alternative ground, stating that "[i]n view of our holding on the limitations issue, we find it unnecessary to consider the plaintiff's argument that standards other than the [Illinois] Child Labor Law . . . are to apply in determining what constitutes an 'illegally employed minor'" (*infra*, p. 4a). Accordingly, the judgment of the Illinois Supreme Court does not rest on an independent state ground.

[2] *E.g.*, *Jimenez* v. *Weinberger*, 42 USLW 4948 (1974); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *In re Winship*, 397 U.S. 358 (1970); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967); Tribe, L., *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, to be published in the forthcoming Winter-Spring 1974 issue of *Law and Contemporary Problems*.

tion of the kind of procedural protection which must be afforded as the precondition to the extinction of important interests.[3] And it again puts into issue the demands of equal protection,[4] this time to determine whether that imperative can be squared with placing an "illegally employed minor" in a worse position than other minors by tolling for other minors, but not for the illegally employed minor, the running of a limitations period during disability.

1. Illinois substitutes a system of workmen's compensation for a common law action in tort to indemnify workers for injury or death sustained in an industrial accident, but preserves the common law remedy for an "illegally employed minor" upon his or his representative's rejection of workmen's compensation benefits filed with the Industrial Commission within six months after the time of injury or death. It makes no difference whether this option to proceed at common law is called the retention of a preexisting remedy to enforce an ancient right to be free of tortious invasion of the person, or is described as a newly-created "statutory entitlement" (*Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970); *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972)),

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[3] *E.g.*, *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Arnett* v. *Kennedy*, 416 U.S. 135 (1974); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *U.S. Dep't. of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Co.*, 395 U.S. 337 (1969).

[4] See Gunther, G., *The Supreme Court, 1971 Term—Foreword: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

or "whether the entitlement is denominated a 'right' or a 'privilege' " (*Bell* v. *Burson*, 402 U.S. 535, 539 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970)). For, however characterized, the availability of the option confers protection of an important interest (to be compensated for bodily harm wrongfully inflicted) by a means significantly different from any other (a common law action in tort). The entitlement to this substantive protection by this procedural means of vindicating it constitutes an equally protectible legal interest whether it has its source in the statute or is traced to its earlier lineage in the common law. To put a blunt point to it, the workmen's compensation benefits for an amputated hand have a value to petitioner of about $15,000, and counsel informed as to such matters estimate the recovery at common law for the same injury to be within the range of $50,000 to $100,000. A right whose exercise can make a difference of $35,000 to $85,000 constitutes a legally protectible interest by any measure. *Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

2. Due process is offended by time-barring an illegally employed minor in exercising his right to bring a common law action to recover for injury sustained in an industrial accident when the minor has not been informed of the six-month limitations period within which he must act and no guardian has been appointed to protect his interests.

Illinois makes no provision for informing a minor involved in an industrial accident that he has a right, which he must exercise within six months of his injury, to proceed at common law to recover damages if he has been illegally employed. Yet apprisal of the ex-

istence of the right and of the time within which it must be exercised is indispensable to a minor's actual realization of its benefits. Notice is of course an elementary and fundamental requirement of due process. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).[5] And while a limitations period may run against an adult without notifying him that he has a right which is subject to defeasance by a time-bar, it cannot run against a minor because by hypothesis he lacks competence to manage his affairs with the informed understanding that goes with adulthood.[6]

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[5] See also, *Paschall* v. *Christie Stewart*, 414 U.S. 100 (1973); *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); *Schroeder* v. *New York*, 371 U.S. 208 (1962); *New York* v. *New York, New Haven & Hartford R. Co.*, 344 U.S. 293, 296-297 (1953).

[6] Like all States, Illinois treats minors as legally incompetent. Ill. Rev. Stat., ch. 3, §§ 131, 141 (1973). Minors cannot commence or defend suits in their own names. They must have a guardian, next friend, or guardian *at litem* for this purpose. *Id.* § 141; *Stanczyk* v. *Keefe*, 384 F.2d 707, 708 (C.A. 7, 1967). The Probate Act places courts under a duty to protect the interests of minors which may be affected by judicial proceedings by providing for the appointment of a guardian. Illinois makes exceptions to its general statutes of limitations for minors. Thus, the limitations periods for both real and personal actions are tolled for minors until their disability is removed, notwithstanding that more than the full period of limitations may otherwise have run. Ill. Rev. Stat., ch. 83 §§ 9, 22 (1973); *Stanczyk* v. *Keefe, supra.* See *infra*, pp. 11-13.

Federal policy is in accord in providing special protection for minors in judicial proceedings. The court shall appoint a guardian *ad litem* to represent a minor not otherwise represented by a fiduciary or shall otherwise provide for his protection. Fed. R. Civ. Proc. 17(c); *Roberts* v. *Ohio Casualty Ins. Co.*, 256 F.2d 35, 38-39 (C.A. 5, 1958); Wright & Miller, Federal Practice and Procedure: Civil, Vol. 6, § 1570, pp. 775-776 (West, (1971)). A default judgment may not be entered the clerk against an infant, or by the Court unless the infant is represented in the cause by a guardian or other such representative. Fed. R. Civ. Proc. 55(b).

Given his incompetence, the minimum that due process requires as the precondition to divesting the minor of his right is provision for some adequate means of informing him of its existence and its limitations, so that he may at least be alerted to the need to consult an adult about a matter important to him. But Illinois makes no provision for notice of any kind.

Notice is a minimum requirement of due process but would not in itself suffice in the case of a minor. "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement." *Covey* v. *Town of Somers,* 351 U.S. 141, 146 (1956); *Robinson* v. *Hanrahan,* 409 U.S. 38, 40 (1972). Like others under a disability, a minor as an incompetent person is by definition "without mental capacity to handle . . . [his] affairs or to understand the meaning of any notice served upon" him. *Covey* v. *Town of Somers, supra.* The brightest youth does not ordinarily have the knowledge, experience and sophistication essential to an informed judgment as to whether he is an "illegally employed minor," and, if he is, whether he is better served by opting for the lesser but safer workmen's compensation benefits or the greater but riskier recovery through pursuing a common law action. The appointment of a guardian is the means by which this gap in understanding is bridged when a minor is called upon to make an adult decision. Yet Illinois allows a time-bar to cut off a minor's right although he is without the protection of a guardian during the period that limitations are running.

The absence of any provision for notice plus the absence of any protection afforded by guardianship is a compounded vice which cannot survive the require-

ment of due process of law. It of course will not do to say that, as Illinois could have wholly remitted an illegally employed minor to his workmen's compensation remedy, it was free to create a right in him to proceed at common law without also providing that limitations would not run on the exercise of that right absent notice or guardianship. For the conferment of a right requires as a matter of due process the establishment of a means sufficient to assure its realization. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974).[7] Whatever its source, so long as the right is in being, the beneficiary of it must be "afforded . . . some real opportunity to protect it." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 682 (1930). The dignity of the rule of law will not tolerate the farce of creating a right without providing the means of vindicating it.

3. Denial of equal protection accompanies denial of due process. For, unlike the illegally employed minor sustaining an injury in an industrial accident, Illinois tolls its general statutes of limitations for all other minors and other incompetent persons during the period of their incapacity and allows them to "bring the action within two years after the disability is removed" (Ill. Anno. St., ch. 83, § 22 (Smith-Hurd, 1966)):

> If the person entitled to bring an action, mentioned in the nine preceding sections, is, at the time the cause of action accrued, within the age of twenty-one years, or if a female, within the age of eighteen years, or insane, mentally ill, or imprisoned

[7] Opinion of Marshall, J., in which Douglas and Brennan JJ., joined (416 U.S. at 206); opinion of Powell, J., joined by Blackmun, J. (*id.* at 164); opinion of White, J. (*id.* at 171).

> on a criminal charge, he or she may bring the action within two years after the disability is removed.[8]

Limitations thus do not act as a time-bar until two years after a minor reaches his majority in actions for defamation or violation of the right to privacy (§ 14), for personal injury, false imprisonment, malicious prosecution, statutory penalties, abduction, seduction, or criminal conversation (§ 15), on oral contracts, on arbitration awards, and for damage to real or personal property, recovery of possession of personal property or damages for its retention or conversion, and on claims not otherwise provided for (§ 16), on written contracts of every variety (§ 17), and on claims in other situations (§§ 18-21). Similarly, a minor may not be time-barred from making entry on land and bringing an action on or for land until two years after he reaches his majority (§ 9). So too, while the precondition of an action for personal injury against a municipality is notice to the municipality of an intention to sue filed within six months of the injury, this requirement does not apply to a minor, the Illinois Supreme Court observing that it "is not improper to say that if the construction . . . [requiring notice by a minor] were adopted it would undoubtedly render the act unconstitutional as depriving . . . [the minor] of due process of law." *McDonald* v. *City of Spring Valley*, 285 Ill. 52, 55, 120 N.E. 476, 477 (1918). Finally, the precondition to bringing an action against

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[8] Effective July 1, 1972, this section was amended to reduce to 18 the age when a male reaches majority. Ill. Rev. Stat., ch. 83, § 22 (1973). The amendment is not relevant to this case for, even were it in effect when the accident occurred, petitioner's action would have been time-barred before he reached 18.

a public or private school for personal injury or property damage is the giving of written notice to the appropriate school representative within six months of the event, but this requirement is not applicable to minor claimants, the Illinois Supreme Court observing that were notice to be exacted of a minor "the Legislature could have provided for notice by next friend or legal guardian . . . ." *Haymes* v. *Catholic Bishop of Chicago,* 33 Ill. 2d 425, 428, 211 N.E. 2d 690, 692 (1965).

The upshot is that the illegally employed minor injured in an industrial accident stands in virtual isolation from all other minors in running limitations against him during his disability. This discrepant treatment is invalid whether equal protection is measured by the standard of "rational basis," or "compelling interest," or an in-between blend that proportions the allowable latitude of a classification to the importance of the affected interest. Whatever the standard equal protection cannot sanction the discrimination which inheres in imposing the time-bar during the disability of an illegally employed minor but tolling it for all other minors in virtually all other actions. There is no conceivable basis in reason for putting an illegally employed minor in this inferior position. An Illinois minor injured in an automobile accident can defer bringing his action until he has attained his majority plus two years (*Stanczyk* v. *Keefe,* 384 F.2d 707, 708 (C.A. 7, 1967)), but an illegally employed minor injured in an industrial accident must willy-nilly act within six months of his injury. This differentiation is "entirely arbitrary" (*Smith* v. *Cahoon,* 283 U.S. 553, 566-567 (1931)), not " 'based on a real and substantial relation to the subject of the particular legislation' " (*Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389,

400 (1928)), and constitutes therefore invidious discrimination offensive to equal protection.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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November 1974

APPENDIX

APPENDIX

Opinion

SUPREME COURT OF ILLINOIS
UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of May in the year of our Lord, one thousand nine hundred and seventy-four, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice

Justice Walter V. Schaefer
Justice Daniel P. Ward
Justice Joseph H. Goldenhersh
Justice Thomas E. Kluczynski
Justice Charles H. Davis
Justice Howard C. Ryan

William J. Scott, Attorney General

William G. Lyons, Marshal

Attest: Justin Taft, Clerk

Be It Remembered, that afterwards, to-wit, on the 29th day of May, 1974, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 45930

Luther Estep, a minor, etc., *Appellant*

vs.

Janler Plastic Mold Corporation, *Appellee*

Appeal from Appellate Court, First District

Justin Taft
Clerk of the Supreme Court
State of Illinois

Docket No. 45930—Agenda 24—March, 1974.

LUTHER ESTEP, *Appellant*,

v.

JANLER PLASTIC MOLD CORPORATION, *Appellee*.

MR. JUSTICE DAVIS delivered the opinion of the court:

This case asserts a common-law action for injuries suffered by a minor while employed by the defendant corporation under the Illinois Workmen's Compensation Act. (Ill. Rev. Stat. 1967, ch. 48, par. 138.1 *et seq.*) The minor was 16 years of age when he was injured, and after a guardian was appointed, a rejection of workmen's compensation benefits was filed on the minor's behalf. This suit was then brought in the circuit court of Cook County. That court granted the defendant's motion to strike or dismiss the plaintiff's amended complaint, and the appellate court affirmed (11 Ill. App. 3d 551). We granted leave to appeal.

The plaintiff was injured while doing work in connection with the cleaning and maintenance of a band saw. The defendant does not deny that such work was prohibited by the regulations adopted pursuant to the Federal Fair Labor Standards Act of 1938 (29 U.S.C. secs. 212(c), 203(*l*) (1970).) The plaintiff argues (1) that his rejection of workmen's compensation benefits was timely made since it was made within 1 month after the appointment of a guardian, and (2) that the provisions of the Fair Labor Standards Act are applicable to the term "illegally employed minor" under the Workmen's Compensation Act. We will consider first the question of whether the rejection of benefits was timely filed.

The plaintiff alleges that the 6-month period for rejection of benefits does not run until the appointment of a guardian. He contends that minors are under a legal disability and do not have the power to reject their rights

under the Act, and urges that rejection of benefits by the guardian, in less than a month after his appointment, even though more than 6 months after the injury, is timely.

In *Ferguson v. Industrial Com.* (1947), 397 Ill. 348, 352, the court held that the requirement that notice of an injury must be given to the employer within 30 days of that injury applies to minors on the grounds that the Act created a special statutory cause of action unknown at common law, and, "The commission, a creature of the statute, is not a court. It is an administrative body charged with the duty of administering the act under which it was created. The liability or nonliability of an employer is one imposed by the act itself, and unless an employee, claiming the right to an award, brings himself within the jurisdictional provisions of the act, no award can be granted him. (*Keller v. Industrial Com.*, 350 Ill. 390.)"

In *Johnson v. Industrial Com.* (1972), 53 Ill.2d 23, 24, it was held that the 1-year-limitation provision of the Act was applicable to minors on the authority of *Ferguson.* The distinction between jurisdictional requirements and limitations provisions was explicitly rejected. The rationale of *Ferguson* and *Johnson* dictates that we hold here that the 6-month period for the rejection of benefits runs from the time of the injury, not from the time of appointment of a guardian. Therefore, the plaintiff here did not timely reject his benefits under the Workmen's Compensation Act, and that act is his sole remedy for damages suffered due to this injury. (Ill. Rev. Stat. 1967, ch. 48, par. 138.5.) The circuit court was correct in granting the defendant's motion to dismiss the amended complaint. The court in *Johnson* concluded its dissertation on the limitation provisions, at page 27, as follows:

> "Accordingly, we hold that appellant, although a minor, was bound by the one-year limitation of the Act, and having failed to file within the specified time limit his applications were properly dismissed."

In view of our holding on the limitation issue, we find it unnecessary to consider the plaintiff's argument that standards other than the Child Labor Law (Ill. Rev. Stat. 1967, ch. 48, par. 31.1 *et seq.*) are to apply in determining what constitutes an "illegally employed minor."

We, therefore, hold that the amended complaint was properly dismissed, and the judgments of the appellate and circuit court are therefore affirmed.

Judgments affirmed.

56357

LUTHER ESTEP, a minor, by JAMES STANLEY, his legally appointed guardian, *Plaintiff-Appellant,*

v.

JANLER PLASTIC MOLD CORPORATION, a corporation, *Defendant-Appellee.*

Appeal from Circuit Court of Cook County.

Honorable Ben Schwartz, Presiding.

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

Plaintiff appeals from an order dismissing his amended complaint. Plaintiff was injured on September 26, 1968, while employed by defendant to maintain an electrically powered band saw. At the time of the injury plaintiff was 17 years of age. Contending that he was an "illegally employed minor," plaintiff rejected his rights to benefits under the Workmen's Compensation Act and proceeded against defendant in an action for damages as permitted by Section 5(a) of the Act. Defendant moved to dismiss plaintiff's amended complaint, arguing that he was not an "illegally employed minor" and hence not eligible to reject his Workmen's Compensation benefits and that plaintiff

had failed to file his rejection of the benefits within the six month period prescribed by Section 5(a) of the Act.

The complaint was dismissed and plaintiff urges on appeal that his rejection of benefits as an illegally employed minor was timely filed.

Section 5(a) of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. 1967, ch. 48, par. 138.5) permits an "illegally employed minor or his legal representatives," within six months from the date of injury, to reject his right to benefits under the Act and to pursue a common law or statutory remedy to recover damages for such injury. Plaintiff maintains that he was an "illegally employed minor" because his employment constituted "oppressive child labor" which as defined by the federal Fair Labor Standards Act of 1938 can, under certain circumstances, cover employees between the ages of 16 and 18 years. 29 U.S.C. §§ 203(l), 212(c) and Order 14 of the Secretary of Labor, 29 CFR, ch. V, Part 570, § 570.65; CCH Labor Law Reporter, Vol. 1, ¶ 23,720.51.

James Stanley was appointed plaintiff's guardian on September 23, 1969. The rejection of the workmen's compensation benefits was filed with the Illinois Industrial Commission on November 17, 1969. This common law cause of action was commenced on March 10, 1970.

We cannot accept plaintiff's contention that the federal Fair Labor Standards Act definition of the term "oppressive child labor" is controlling in our interpretation of the Illinois Workmen's Compensation Act's use of the term "illegally employed minor." Rather do we look for such assistance to the Illinois Child Labor Law (Ill. Rev. Stat. 1967, ch. 48, par. 31.1) which provides that a minor under 16 years of age cannot be lawfully employed to do the kind of work engaged in by plaintiff. Since plaintiff was 17 at the time of the injury, he was not an "illegally employed minor."

But even if we were to accept plaintiff's contention (which is denied by defendant) that plaintiff was an illegally employed minor for purposes of Section 5(a), we would still be compelled to affirm the dismissal of the complaint. Section 5(a) of the Workmen's Compensation Act specifically states that the rejection of benefits under the Act must be filed by the minor or his legal representatives "within 6 months of the time of injury or death." In the case at bar plaintiff was injured on September 26, 1968. His guardian who was appointed on September 23, 1969, did not file a rejection of the Workmen's Compensation benefits with the Industrial Commission until November 17, 1969. We disagree with plaintiff's argument that the six month period begins to run from the date on which a guardian is appointed. The six month period begins to run from the date on which the employee is injured, not the date on which a guardian is appointed. *Cadwell* v. *National Tea Co.*, 343 Ill. App. 206, 98 N.E.2d 516. Therefore, even if plaintiff was an illegally employed minor, his rejection of the right to benefits under the Workmen's Compensation Act was not filed within the prescribed period. Thus on this ground also plaintiff's complaint must fail.

The judgment is affirmed.

Affirmed.

English and Lorenz, JJ., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 70 L 3412

LUTHER ESTEP, a minor, etc., *Plaintiff*

v.

JANLER PLASTIC MOLD CORP., a corporation, *Defendant*

Order

The motion of Janler Plastic Mold Corporation coming on for hearing on due notice and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, that based on *Cadwell* v. *National Tea Co.*, 343 Ill. App. 206 (1951), *Ferguson* v. *Industrial Commission*, 397 Ill. 348, and *Neville* v. *Wichita Eagle, Inc.*, 179 Kans. 197, 294 P.2d 248 (1956), Defendant's Motion to Strike or Dismiss plaintiff's Amended Complaint is sustained.

It is further ordered and adjudged that the cause be and is hereby dismissed and that the plaintiff take nothing from said defendant and that said defendant go hence without day.

Name Lord, Bissell & Brook
Attorney for Defendant
Address 135 S. La Salle
City Chicago, Ill.
Telephone

....., 19....

.....
Judge

Circuit Court
June 15, 1971
Judge Ben Schwartz
Matthew J. Danaher, Clerk of the Circuit Court
of Cook County

STATE OF ILLINOIS
OFFICE OF CLERK OF THE SUPREME COURT
SPRINGFIELD 62706

June 28, 1974

Asher, Greenfield, Gubbins & Segall
Attorneys at Law
228 North LaSalle Street
Chicago, Ill. 60601

No. 45930—Luther Estep, a minor, etc., appellant, vs. Janler Plastic Mold Corporation, a corp., appellee. Appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ JUSTIN TAFT
Clerk of the Supreme Court

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No. 74-568

In the

Supreme Court of the United States

OCTOBER TERM, 1974

LUTHER ESTEP, a Minor, by JAMES STANLEY, His Legally Appointed Guardian,

Petitioner,

vs.

JANLER PLASTIC MOLD CORPORATION,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

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This case involved an injury to an employee of the defendant who was injured while acting in the scope of his employment. At that time the employee was 17 years old (R. 38) and was subject to the terms of the Illinois Workmen's Compensation Act.

Under the Illinois Workmen's Compensation Act employers who fall under the act are liable without fault and are required to pay their employees Workmen's Compensation benefits as specified under the Act. The Illinois Workmen's Compensation Act provides that with respect to one class of employees, "illegally employed minors", such minors are permitted to reject the Illinois Work-

men's Compensation Act and sue their employers at common law, Ch. 48, §148.5 (Ill. Rev. Stat. 1973). Under Illinois law "illegally employed minors" are minors under 16 years of age (Ill. Rev. Stat. 1973, Ch. 48, ¶31.1). Since Luther Estep was 17 years old at the time of his injury, he was not an "illegally employed minor" under the laws of Illinois (see Illinois Appellate Court opinion at pages 4a-5a of Plaintiff's Petition for a Writ of Certiorari). Accordingly the provision relied upon by the plaintiff as setting forth a constitutional issue to be heard by this court does not apply to this plaintiff.

Contrary to plaintiff's assertion that this minor employee is treated differently from all other minor employees, the fact is that this employee was not an illegally employed minor under Illinois law and he was treated exactly like all other employees over 15 years old who are subject to the Illinois Workmen's Compensation Act.

With respect to the argument that this minor plaintiff has been deprived of his constitutional rights, any examination of the Illinois statute shows that this contention is incorrect. All employees, adult or minor, are treated exactly alike under the law of Illinois and all are entitled to receive Workmen's Compensation benefits for injuries incurred during the course of their employment. The one class of employees which are given additional rights are "illegally employed minors" who are given the special privilege of rejecting Workmen's Compensation benefits and proceeding with an action at common law. However, this special class is limited to minors under 16 years of age (Ch. 48 ¶31.1, Ill. Rev. Stat. 1973) and the legislature has specifically set forth the requirements to obtain these additional rights (Ch. 48, §138.5, Ill. Rev. Stat. 1973).

It is clear that neither the Illinois courts or the Illinois Legislature have deprived this plaintiff of any common law rights, but on the contrary, this plaintiff has been treated in the same manner as all other employees, 16 years of age or older.

CONCLUSION

This case does not involve any issue requiring a decision by this court. Under the facts of this case the decisions by the Illinois Supreme and Appellate Courts are correct. Plaintiff's Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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DEC 10
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-568

LUTHER ESTEP, a Minor, by JAMES STANLEY, HIS Legally Appointed Guardian, *Petitioner*

v.

JANLER PLASTIC MOLD CORPORATION, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-568

LUTHER ESTEP, a Minor, by JAMES STANLEY, HIS Legally Appointed Guardian, *Petitioner*

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JANLER PLASTIC MOLD CORPORATION, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF FOR PETITIONER

The sole purpose of this reply brief is to scotch any misimpression that the judgment of the Supreme Court of Illinois rests on an independent state ground.

In its brief in opposition to certiorari, respondent asserts that petitioner "was not an 'illegally employed minor' under the laws of Illinois", and therefore the "constitutional issue to be heard by this court does

not apply . . ." (p. 2). But the Supreme Court of Illinois expressly pretermitted this ground of decision and relied exclusively on the time-bar as the basis for its judgment (Pet. 4a). It is the imposition of the time-bar that presents the federal constitutional question; the judgment whose review is sought rests solely on that time-bar; there is, therefore, no independent state ground on which to support the judgment.

To preclude any misunderstanding, we reiterate what we stated as to this matter in our petition (p. 6, n. 1):

> Janler [the respondent] had also moved to dismiss the complaint on the ground that the determination whether a minor was illegally employed is governed solely by reference to Illinois law to the exclusion of federal law, and that by Illinois law Estep was not illegally employed (R. 17). The Circuit Court ordered and the Appellate Court upheld dismissal of the complaint on this alternative ground as well as on the limitations ground (*infra*, pp. 5a, 7a). However, the Illinois Supreme Court expressly refrained from basing decision on the alternative ground, stating that "[i]n view of our holding on the limitations issue, we find it unnecessary to consider the plaintiff's argument that standards other than the [Illinois] Child Labor Law . . . are to apply in determining what constitutes an 'illegally employed minor' " (*infra*, p. 4a). Accordingly, the judgment of the Illinois Supreme Court does not rest on an independent state ground.

It goes without saying that this Court has jurisdiction to review a final judgment where "the state court does not decide against a petitioner or appellant upon an independent state ground. . . . We cannot refuse jurisdiction because the state court might have based

its decision, consistently with the record upon an independent and adequate non-federal ground."[1] Since the judgment below was not rested on an independent state ground, the federal constitutional question is squarely presented, and respondent states no reasons at all in opposition to review of that question.

Respectfully submitted,

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December 1974

[1] *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98 (1938). See also, Stern and Gressman, Supreme Court Practice, 137-138 (4th ed. 1969), and cases cited.